No. 21745

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SIGNAL OIL AND GAS COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF FOR APPELLANT.

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I.

Jurisdictional Statement.

This is a petition to review and set aside an order of the National Labor Relations Board, hereinafter referred to as "the Board," entered on August 24, 1966, finding that the petitioner had engaged in unfair labor practices within the meaning of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 USC 151 *et seq.*,[1] hereinafter referred to as "the Act."[2]

The underlying action was brought by National Labor Relations Board, Region 31, for alleged unfair labor practices arising out of the discharge of an employee, Louis E. Evans, pursuant to Section 10(b) of the National Labor Relations Act.[2]

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[1]The Board adopted as its order the recommended order of the trial examiner dated May 18, 1966, with modifications, which are set forth in Appendix "A".

[2]29 USC 160(b).

The petitioner Signal Oil and Gas Company, filed a timely petition to review and set aside the order of the Board dated August 24, 1966. This Court's jurisdiction accordingly rests upon 29 USC 160(f).

II.

Statement of the Case.

1. The Action as Brought Under National Labor Relations Act.

This is an action initially brought by the National Labor Relations Board upon a charge filed by the Teamsters, Chauffeurs, Warehousemen & Helpers Local No. 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, alleging that petitioner had engaged in unfair labor practices in violation of Sections 8(a)(1) and (3) of the Act when petitioner discharged an employee, Louis E. Evans. Mr. Evans was discharged by petitioner on September 30, 1965, following the employer's investigation which preceded and followed an expression by the employee regarded by the Board as an expression of support and sympathy with the Oil, Chemical and Atomic Workers International Union AFL-CIO, Local 1-19, hereinafter referred to as "The Oil Workers."

Petitioner is a company whose principal place of business is in Los Angeles, California and who is engaged in producing, refining and selling petroleum products. It maintains and operates a petroleum refinery in Bakersfield out of which petroleum products are distributed. The employee, Evans, was engaged as a

truck driver in the Marketing Transportation Department located a mile from the refinery, and picked up products from the refinery for deliveries to customers.

Following the filing of a complaint by the Regional Director of the Board for Region 31, a hearing was held on January 27, 1966 before the trial examiner, Louis S. Penfield, whose decision and recommended order was rendered on May 18, 1966 finding that petitioner had engaged in unfair labor practices and ordered petitioner to take the action specified therein as contained in Appendix "A" hereto.

On July 5, 1966 petitioner took exception to the trial examiner's decision and order and the case was submitted to the Board on Briefs. On August 24, 1966 the Board entered its decision to affirm the rulings of the trial examiner and adopted the recommended order of the trial examiner as modified by the Board.[3]

2. The Facts of This Case.

The employee, Louis E. Evans, was employed as a marketing truck driver operating out of the Bakersfield Marketing Transportation office which is located in the vicinity of petitioner's Bakersfield Refinery,[4]

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[3]Appendix "A".

[4]TR p. 12 l. 7 and TR p. 79 l. 10, 14 the testimony shows the Marketing Transportation office had the same address as the refinery but was located a mile from the refinery. (NOTE: The reference "TR", "p", and "l" in footnotes refer to the reporter's transcript of the hearing before the trial examiner on January 27, 1967, made a part of the record by designation, and to the page and line referred to.)

and had been so employed until his discharge on September 30, 1965.

At the time of his discharge and prior thereto, the Refinery Workers were represented by the Oil Workers who were engaged in contract negotiations, whereas the marketing truck drivers were not represented by that union nor any other since 1962.[5]

On September 24, 1965 Evans was engaged by Walt Bright, a pumper gauger in Signal's pipeline division, in a conversation, in the presence of Fred Brown, a dispatcher-supervisor for petitioner and Evans' superior, in which Evans made a remark about the refinery employees' union activities. As to the contents of this remark, various versions were testified to at the hearing before the trial examiner. In response to a question from Bright about what Evans thought of the refinery employees voting for a strike, Evans testified his answer was "Good, good, I hope they do."[6] As to the remark made by Evans, James Rasbury, a witness for petitioner at the hearing before the trial examiner, testified he was told the response was "Good, it will teach this cheap company a lesson."[7] As to this same remark, Malcolm Dawson, also a witness for petitioner, testified the remark was "I hope they do, maybe it will teach this cheap company something."[8]

On September 24, 1965, Brown, Evans' Supervisor, during a routine phone report, to his department manager Dawson, reported on Evans' retort.[9]

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[5]TR p. 8 l. 20-26 and p. 9 l. 1-22. Stipulation that by election the truck drivers were not represented which election was certified by the Board on June 13, 1962.

[6]TR p. 15 l. 14.

[7]TR p. 37 l. 23.

[8]TR p. 79 l. 4-5.

[9]TR p. 85 l. 21 through p. 86 l. 9.

On September 28, or 29, 1965,[10] Dawson and Rasbury met with H. J. Stroud, petitioner's Vice President in charge of employee relations, at which time Evans' personnel file, his past demeanor and conduct, including his response to Bright about his opinion of the refinery workers' possible strike, were discussed.

The file showed that Evans was a chronic complainer, that he had been placed under surveillance because of a suspicion of stealing gasoline, and that he was under suspicion and investigation for filing an insurance claim seeking a reimbursement for his wife's medical expenses under petitioner's health and welfare policy, which was based upon fraudulent statements.[11]

Evidence at the hearing before the trial examiner showed that a decision was reached at this meeting to discharge this employee, after considering his past record. The evidence also showed that an additional fact was considered at this meeting which entered into the decision to discharge this employee, that of lack of work at the unit in which this employee was working. The consequence of this meeting was the discharge of Evans on September 30, 1965,[12] through his supervisor, Brown, at which time he was shown a termination slip, which Evans refused to sign which designated that the reason for discharge was "poor attitude. I feel that both the company and the employee will be better off if he is terminated."[13]

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[10]TR p. 36 l. 17-19.

[11]TR p. 38 l. 7 through TR p. 40 l. 11 and TR p. 71 l. 24 through p. 72 l. 8.

[12]TR p. 47 l. 9-15.

[13]Exhibit 3 introduced by respondent at hearing before trial examiner on January 27, 1967; See also TR p. 47 l. 24-p. 48 l. 10 and TR p. 92 l. 3-25.

The case was taken before the Board who adopted the trial examiner's findings, conclusions and recommendations with modifications and issued its broad order to cease and desist from various discriminative practices, to post notices and to reinstate Evans with reimbursement of full pay[13a] and is now before this Court for review and to set aside the Board's order and the Board's answer requesting enforcement.

III.

The Questions Presented.

1. Whether a statement of an employee was an expression of sympathy with, and support of, strike activities of fellow workers in another unit, and was of such character as to be a protected activity under the Act.

2. Whether an employer is precluded from examining the merits of, and discharging an employee for cause after he has expressed himself as being in favor of strike action by employees of another unit of his company.

IV.

Argument.

1. A Remark, to Be Protected, Must Be Within the Meaning of the Act.

The significant fact upon which this case is predicated is a statement by Louis E. Evans on or about September 23, 1965, about the contents of which there is some conflict in the evidence. Evans testified before the trial examiner that he made a statement to another employee, Walter Bright, employed in the pipeline di-

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[13a]See Appendix "A" for text of order.

vision of the same company, in response to a question which he summarized to be what he (Evans) thought of the refinery's voting a union strike. His answer was "Good, good, I hope they do"; then Evans added "it is impossible that they couldn't go on strike because it would deadlock California."[14]

As to what Evans' statement contained and what was discussed in a meeting between Evans' Department Manager, the Manager of Personnel Employee Relations Department, and Vice President in charge of Employee Relations, there are some differences of opinion.

Rasbury, Manager of Employee Relations, recalled the statement reported as being made by Evans as "Good, it will teach this cheap company a lesson," while Dawson, Evans' department manager, testified "I hope they do, maybe it will teach this cheap company something."[15]

It is true that in all versions of the remark it is agreed that it contained an expression of hope that a strike by the refinery workers would occur, but the latter two versions contain the derogatory remark "this cheap company." It is the latter versions of the remark that were given consideration at this meeting. On this point the trial examiner concluded that in view of the conflict, the only point worth considering was the point in the remark about the strike and he dismissed what he termed an "unflattering remark" about the employer without any consideration.[15a] When reviewing the

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[14]TR. p. 15 l. 12-17.
[15]TR p. 79 l. 4, 5.
[15a]D. p. 3 l. 47 Footnote 2. (NOTE: The reference "D" as used in the footnotes refer to the trial examiner's decision dated May 18, 1966 which is made a part of the records by Petitioner's designation.)

personnel file of an employee which contained several reports of misconduct, as did the Evans' file, a seemingly insignificant remark like "this cheap company" becomes one more piece of the undesirable picture of this employee and certainly leans heavily to reflect the employee's attitude towards his employer.

Despite the variations in the statement, what is also significant is the circumstances under which the expression was uttered. As already pointed out, the statement was made by the invitation of a question and was not initiated by Evans through his own volition. No evidence was given that indicated Evans had any grievances against the company, nor was any evidence given that Evans was involved whatever in any union activities. On the contrary, as to the latter point, the trial examiner found that Evans had not even talked to refinery employees about the strike,[16] indicating Evans could not have given encouragement or support to members of that unit.

No evidence was presented of facts either preceding or succeeding the celebrated remark of Evans that would permit the examiner of facts to conclude intent, design, plan, scheme or other use of the remark.

The trial examiner concluded that the remark was not a call by Evans to concerted action[17] but was a protected activity because "it does express support by Evans of such action (to strike) by his fellow employees in another unit,"[18] and thus was entitled to protection of the Act.[19]

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[16]D. p. 4 l. 37-39; TR p. 24 l. 20-22.
[17]D. p. 5 l. 47.
[18]D. p. 5 l. 47.
[19]National Labor Relations Act, 1947 as amended by Public Law 86-257, 1959. Section 7. See 29 USCA Section 157.

The trial examiner bases his decision on two conclusions: (1) that Evans made his remark in hope of reciprocal support by the employees of the other unit,[20] and (2) that Evans made his remark in anticipation that he or his group might receive similar support (from the refinery workers) should the occasion arise.[21]

In the first place the conclusions are not founded on any evidence in the record but are mere assumptions that Evans expected reciprocal support or anticipated action by the group of which he was a member. The evidence itself goes contrary to these assumptions.

As a matter of logic, if Evans wanted the reciprocal support of the other unit which, at the time of his remark was involved in collective bargaining, he would have at least discussed the strike with the refinery workers. Evans testified that he did not discuss the strike with refinery employees, nor was any evidence offered that he ever had any discussions about any other union matters, therefore, no expression of support was communicated by Evans to the refinery group, nor is there evidence that Evans ever intended such an expression.

The entire record is replete with the absence of evidence that Evans or any of the workers in his unit were anticipating any activity that would have required support of the refinery workers.

The trial examiner held that the remark was not a call to concerted action yet concluded that it was concerted through what he erroneously found to be an expression of support without qualifying who the ex-

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[20]D. p. 5 l. 50.

[21]D. p. 5 l. 53-54.

pression would help. The record indicated that only Bright, an employee in still another entirely separate unit (the pipeline division of the company) and his supervisor, Fred Brown, heard the remark.[22]

Whether an activity is protected or not, depends not only on the wording and purposes of the Act, but on the precise nature and effect of the employee's conduct." *International Ladies Garment Workers Union, AFL-CIO v. N.L.R.B.,* 299 F. 2d 114, 117. The Act, in Section 7 thereof, reads in part as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

Under no circumstances did Evans' conduct at any time surrounding his remark indicate any concerted activity for the purpose of collective bargaining or other mutual aid or protection. The Second Circuit held that for a remark to be protected, the subject matter must be concerned with present or future collective bargaining or with the employee's mutual aid or protection. *N.L.R.B. v. Jamestown Veneer & Plywood Corp.,* 194 F. 2d 192. In that case four employees walked off the job (in protest of the refusal of the

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[22]TR p. 14 l. 3-16 and TR p. 32 l. 8-10.

employer to reinstate four other employees) and were not recalled for work by the employer. The trial examiner found that the walkout was in protest of notice of lay-off but the circuit court held that there was no relation to the walkout and notice of lay-off because there was no labor dispute pending on notices of lay-offs.

Similarly, in this case there was no evidence that either Evans, or Bright, or the unrepresented groups of which they were a part, at that time, or in the near future, contemplated either organizational activities, other action for their mutual aid or protection, or action in support of the refinery employees represented by the Oil Workers. Furthermore, it should be noted that there is no record evidence whatever that petitioner was hostile to the oil workers or opposed in any way the exercise by its employees of their organizational rights, whether they were represented or unrepresented.

". . . (F)ederal Appellate Courts have consistently held that concerted activity is protected only where such activity is intimately connected with the employee's immediate employment," or relate to "organizational matters" or be "germane to the employment relationship" *N.L.R.B. Bretz Fuel Co.,* 210 F. 2d 392, 396. See also *Jefferson Standard Broadcasting Company,* 94 N.L.R.B. 1507, 1511-1512. For Evans' remark to be accorded a protected status it must be intimately connected or germane to his or Bright's immediate employment and not to a remote group whose status or bargaining objectives are not indicated as being known by Evans.

The authorities also show that for employee action to be "protected", it must be engaged in according to a

"plan" or a "joint scheme" or a "pre-existing group understanding." *General Electric Company,* 155 N.L.R.B. No. 24 pages 16-18. *N.L.R.B. v. Texas Natural Gasoline Corp.,* 253 F. 2d 322 (C.A. 5). None of these tests is met by Evans' remark. Most pertinent in this connection is the Board's recent decision in *Continental Manufacturing Corporation,* 155 N.L.R.B. No. 26. In *Continental,* during a period of employee unrest and at a time when the dischargee, Ramirez, was acting jointly with another employee to police the unsanitary rest room facilities used by the employees and for which the employees had been criticized, Ramirez wrote, and gave to, a company owner, a letter critical of management, of employee working conditions, of company supervisors, and of the rest room maintenance. The letter was phrased to indicate that it was a protest on the part of both Ramirez and her fellow employees. Thus, it spoke of "our need for money", "the majority of employees", "we believe in", and "we had to ask, etc.". The letter resulted in Ramirez' discharge for insubordination. The Board, overruling the trial examiner, held that Ramirez had not engaged in a protected activity when she wrote the letter. Thus, despite the context in which the letter was written and its specific phraseology, the Board concluded that Ramirez was acting for herself and not on behalf of her fellow employees.

It cannot be shown that Evans made his remark pursuant to or in conjunction with any plan, joint scheme or pre-existing group understanding. His remark was a spontaneous answer to a direct question, the thought process of which obviously took only seconds, according to recorded testimony of Evans.

The Third Circuit echoes the Second Circuit. In *Mushroom Transportation Company, Inc. v. N.L.R.B.*, 330 F. 2d 683, 684-685 (C.A. 3), a case which involved a factual pattern equivalent to that which exists in this case, the Court found one Keeler, an extra driver, had been in the habit of talking to other employees and advising them as to their rights. The subject of these conversations were principally holiday pay, vacations and the employer's practice of assigning trips to drivers of other companies rather than to its own regular drivers. The employer discharged Keeler on the ground that he was a "crackpot" and because he had the reputation for being a troublemaker. The Board found, and the Court agreed, that Keeler's activities in general were directly related to the employees' legitimate interests in terms and conditions of employment, and that Keeler had not acted in his personal interest so as to assure his employment on the regular driver list. The Court, however, held that Keeler, in his contacts with the other employees, had not engaged in concerted activities for the purpose of mutual aid or protection within the meaning of Section 7, and that the employer had not violated the Act by discharging him. The Court said:

> "We look in vain for evidence that would support a finding that Keeler's talks with his fellow employees involved any effort on *his* or *their* part to initiate or promote any concerted action to do anything about the various matters as to which Keeler advised the men or to do anything about any complaints and grievances which they may have discussed with him. It follows that, if we were to hold that Keeler's conversations constituted concerted activity, it could only be upon the

> basis that any conversation between employees comes within the ambit of activities protected by the Act provided it relates to the interests of the employees. We are unable to adopt this view . . . *Activity which consists of mere talk must, in order to be protected, be talk looking toward group action.* If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve *his own status or working position,* it is an individual, not a concerted activity, and, if it looks forward to no action at all, it is more likely to be mere 'griping.' [Emphasis supplied.]"

In sum, Evans' remark, which certainly did not contemplate "group action" by Evans, Bright or the other unrepresented employees, cannot be regarded as a "protected" statement, and the trial examiner's finding to the contrary is clearly erroneous.

2. Discharge for Cause Is Within the Sole Judgment of the Employer and Is Not Lost Because of a Remark of Union Sympathy.

The record shows that Evans' discharge on September 30, 1965 was preceded by a meeting between the manager of his department, the manager of the Employee Relations Department and the Vice President in charge of employee relations, on September 27 or 28, 1965, about three days after Evans' remark about the strike action he believed was being considered by the refinery workers.

At that meeting the personnel file and the oral evaluations of Evans were discussed which summarized that

Evans was a constant griper and complainer, that he was then under suspicion of stealing gasoline for use in his own car and that he was under investigation for making fraudulent statements in an insurance claim for refund of money spent for his wife's medical expenses.[23] At the hearing before the trial examiner the charge of being a constant griper and complainer and of being suspected of stealing gasoline went entirely uncontradicted, however, the fraudulent statements in the insurance claim was disputed.

As to the conduct of Evans, as revealed by the evidence, the trial examiner made no finding of fact whatever and minimized almost into oblivion the employee's misconduct as being a factor to be considered in the discharging of the employee.[24] His conclusion, although mildly stated, suggests that Evans' misconduct was a justification for discharge "but for" the remark which he termed to be protected.[24a]

The trial examiner bases his decision that there was discrimination against this employee in violation of Section 8(a)(3), on three conclusions, (1) that there was no showing that Evans' conduct would have come to the attention of higher management at this time, but for the remark made about the refinery workers,[25] (2) that action was taken by higher management because of the remark, is contrary to petitioners claim that the remark was "casual and innocuous",[26] and (3) that the "process of escalation" carried an impact that precipitated the investigation in the first place.[27]

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[23]TR p. 38 l. 7 through p. 39 l. 4.
[24]D. p. 5 l. 14-17.
[24a]D. p. 5 l. 34.
[25]D. p. 5 l. 19-20.
[26]D. p. 5 l. 21-22.
[27]D. p. 5 l. 31-32.

Common in these conclusions of the trial examiner is the point that after Evans made his remark, he was evaluated as an employee by "higher management." The trial examiner made no explanation of what was unusual by higher management being involved in personnel matters when two of the members in the meeting reviewing this employee were directly responsible for overall company personnel, that is, the Vice President in charge of employee relations and the Manager of the Employee Relations Department.

The facts show that the meeting, involving what the trial examiner terms as "higher management", was not called because of this employee, but because of problems in an "entirely different area of the company."[28] This tends to show that the Evans' remark was not the reason for calling the meeting that the trial examiner erroneously infers.

Furthermore, the record clearly shows that prior to making of the remark Evans' conduct was the subject of conversation between his Department Manager and the Manager of Employee Relations,[29] establishing that a practice existed of oral discussions of employee problems between line management and personal administration.

Dawson, Evans' Department Manager, testified he was informed of a previous statement, sounding of insubordination.[30] While this statement was not considered in the meeting, it must be considered as part of

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[28]TR p. 37 l. 13-16; See also TR p. 83, l. 7.

[29]TR p. 81 l. 23 through p. 82 l. 15.

[30]TR p. 81 l. 5-8 Mr. Brown (Evans' supervisor) reported to Dawson that Evans said, "If the company don't like the way I do things, they can get my check."

the facts that contributed to the consideration of Evans' discharge, on the basis of his conduct.

The record further shows that consideration of this employee at the time of the meeting with the Vice President was an after-thought and not a part of the planned agenda.

The assumption of the trial examiner that the questioning of the desirability of Evans as an employee because of his remark is further negated by the fact that he was then still under investigation for wrongfully taking gasoline and for making fraudulent statements. For the trial examiner to conclude that the desirability of this employee would not have been questioned had the remark never been made, is a flagrant disregard of these two important facts.

The trial examiner's further conclusions that (a) action was taken by higher management because of the remark is contrary to petitioner's claim that the remark was "casual and innocuous"; and (b) that the process of escalation carried an impact that precipitated the investigation in the first place, are assumptions without factual support, that can only be based upon the illogical reasoning that because management of employee relations functions (Manager and Vice President) was involved in this employee's discharge, it must have been because of the employee's remark about the refinery workers' proposed strike.

To show that the trial examiner's reasoning goes aground is the added fact contained in Rasbury's (Manager of Employee Relations Department) testimony that he and Dawson were meeting with the Vice President on an entirely different personnel problem.[31]

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[31]TR p. 37 l. 13-16 See also p. 83 l. 7-9.

What the trial examiner has concluded by his decision is that although the employer had justifiable reasons for discharging Evans, the discharge nevertheless became unlawful merely because it was Evans' remark that brought about the evaluation of him that lead to his discharge. Thus, in practical effect, the trial examiner held that Evans' remark precluded all action by the employer against him, regardless of justification or cause. This is the crucial issue in this case.

It is elementary that if the discharge of an employee is actually motivated by a lawful reason, the fact that the employee is engaged in protected activities at the time will not tie the employer's hand and prevent him from the exercise of his business judgment to discharge the employee for cause. *Pathe Laboratories, Inc.,* 141 NLRB 1290, 1299, 1303; *N.L.R.B. v. Ace Comb Company,* 342 F. 2d 841, 847 (C.A. 8). The Board thus expressed the matter in *Mitchell Transport, Inc.,* 152 NLRB No. 10, p. 3: "Engaging in protected, concerted activity, such as the filing of contractual grievances, *does not perforce immunize employees* against discharge for legitimate reasons." (Emphasis supplied.) This language was expressly repeated by the Seventh Circuit in affirming the Board's dismissal of the complaint in the *Mitchell Transport* case. *Hawkins v. N.L.R.B.,* 61 L.R.R.M. 2622, 2624. And the Fifth Circuit similarly stated in *N.L.R.B. v. Huber & Huber Motor Express,* 223 F. 2d 748, 749:

> Where a legal ground for discharge existed—as it did in this case—and the employee was discharged on that ground alone, obnoxious conduct on his part, in an activity protected by Section 7 of the Act, *will not insulate* him from being discharged on such legal ground. (Emphasis supplied.)

Accord: N.L.R.B. v. Blue Bell, Inc., 219 F. 2d 796, 798 (C.A. 5); *Southern Oxygen Co. v. N.L.R.B.*, 213 F. 2d 738, 742 (C. A. 4). The same basic principle was followed by the Board in *Redwing Carriers, Inc.*, 137 N.L.R.B. 1545, 1547, *aff'd*, 325 F. 2d 1011 (C.A.D.C.). There, the Board held that although employees who refused to cross a picket line at the premises of another employee engaged in protected concerted activity, they nevertheless could validly be discharged if their employer acted only to preserve the efficient operations of his business and terminated the employees in order to get replacements. *Cf. N.L.R.B. v. Rockaway News Supply Co., Inc.*, 345 U.S. 71; *L. G. Everist, Inc.*, 142 N.L.R.B. 193.

Two recent Board cases are directly in point. In each, the Board affirmed the principle that even though an employer's close scrutiny of employee protected activity leads the employer to discover, or uncover, conduct justifying a discharge for cause, an ensuing discharge for the reason thus uncovered does not violate the Act. Thus, in *Harold Brown Co.*, 145 N.L.R.B. 1756, 1766-1767, 1770, 1772, three employees were discharged for drinking an alcoholic beverage in the company's plant. On the day the drinking occurred, the company's vice-president indicated that no action would be taken against the employees because he was doubtful that the beverage was alcoholic. However, six days later, and as a result of evidence uncovered in a "further investigation", the employees were discharged. Such "further investigation" concerned not the drinking incident, but rather the company's close scrutiny of employee conduct connected with a Board-conducted election which the union won—employee conduct which,

clearly, was "protected". The Board affirmed the Trial Examiner's conclusion that the discharges were lawful, and in so doing, approved the Trial Examiner's reasoning (145 N.L.R.B. at 1772) that:

> The most accurate appraisal, in my view, is that, absent the election, Respondent would have not investigated the cider incident as thoroughly as it did, including on-the-spot use of Attorney Crawford and the taking of affidavits. In a sense, at this point, it can be said that there is a "*but for*" situation. But for the election and the investigation to secure grounds for [election] objections, the evidence, on which Respondent states that it relied for its conclusion that the cider was alcoholic and on the basis of which it allegedly made the discharges, would not have been developed as fully as it was. *This "but for," however, is not enough to establish illegality.* (Emphasis supplied.)

Similarly, in *Norge Division, Borg-Warner Corporation,* 155 N.L.R.B. No. 95, the employer discharged two probationary employees who had repeatedly complained about their foremen, about interim layoffs allegedly not in accordance with seniority, and about their "unfair treatment". The employees were discharged when the employer concluded that their "overall attitude" was undesirable. The Board, reversing the Trial Examiner, held that the discharges did not violate Section 8(a)(1). The Board assumed that the employees' conduct in voicing their complaints constituted concerted activity for mutual aid or protection within the meaning of Section 7, but then said (pp. 3-4, slip op.):

> But even on that assumption, we are unable to concur in the Trial Examiner's conclusion that the

> two employees were unlawfully terminated. The crucial question, as we see it, is . . . what in truth impelled the discharges. Were the employees terminated because they engaged in concerted activity? Or were they terminated for some other and legitimate reason that would have impelled the Respondent to take such action even independently of their concerted activity? On the particular facts of this case, we are persuaded that the latter alone formed the motivating basis for the terminations.

Though the trial examiner chose to disregard the facts pointing to grounds for discharge entirely unrelated to Evans' remark about the refinery strike, such facts nonetheless existed without contradiction (except as to the insurance claim) any one of which is a lawful ground for discharge unto itself. For an employer to discharge an employee lawfully, he needs no reason whatsoever so long as the motivation is not violative of the Act. *N.L.R.B. v. Jones & Laughlin Steel Corp.,* 301 U.S. I. The facts in this case clearly show that the employer's motivation was prompted by the poor qualities of Evans as an employee and in no way by what he said in his answer to Bright.

3. The Board Has Not Met the Burden of Proof.

The trial examiner, and hence the Board by its adoption of decision of the trial examiner, with minor modifications, is required to meet the burden of proving that there was a protected activity in the remark by Evans of agreement with the refinery workers' proposed strike, as protected by Section 7 of the Act, and that discharge of Evans was because of his remark and that such discharge was unlawful and in violation of Section 8(a)(1) and 8(a)(3) of the Act.

This requirement of proof is set forth as follows in *N.L.R.B. v. Redwing Carriers, Inc.;* 284 F. 2d 397, 402:

> "This Court, in common with the Courts of Appeals of other circuits, has frequently been faced with the necessity of determining whether a finding by the Labor Board that an employer is guilty of discriminatory firing, is supportable under the recognized legal standards, i.e., substantial evidence on the record taken as a whole. *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456. Many such cases present difficult problems for the court to decide whether the motivating cause of discharge is the one assigned by the company or is a desire to get rid of an employee active in union affairs or other protected activity. The guides to decision in such cases are to be found in the prior decisions of this Court. The opposition of an employer to union organization and even unlawful interference are not enough without more to make the discharge of an employee wrongful." *N.L.R.B. v. Hudson Pulp & Paper Corp.,* 5 Cir., 273 F. 2d 660; *N.L.R.B. v. McGahey,* 5 Cir., 233 F. 2d 406.

In this case not one shred of evidence of opposition to union organization was given nor was there evidence that the employer interfered with any plan, scheme or action to organize. As to either of the charges against this employer, the record does not disclose any facts that meet the burden of proof required by law to establish the violation of either of Sections 7, 8(a)(1) and 8(a)(3) of the Act.

V.

Conclusion.

It is indisputably shown that the activity in the form of the employee's remark about his hopes that the refinery workers would strike was not a protected activity within the meaning of the Act, that the employee was discharged for cause and not because of his remark, and that the respondent failed to meet the burden of proof that there was an unlawful discharge; therefore, we respectfully submit that the Board's order is not in accord with the law or the evidence and should be set aside and its petition for enforcement be denied and the proceeding dismissed.

Dated October 2, 1967.

Respectfully submitted,

A. E. Stebbings,
Harold Judson,
Norman G. Kuch,
By Norman G. Kuch,
Attorneys for Petitioner.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN G. KUCH

APPENDIX "A."

Recommended Order.

I. Recommended order of the trial examiner as contained in his decision of May 18, 1966, made a part of the record by designation of petitioner.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, I recommend that Respondent Signal Oil and Gas Company, its agents, successors, and assigns, shall:

1. Cease and desist from:

a. Interfering with the rights of its employees to engage in activities for their mutual aid and protection, or in support of any labor organization, by their discharge or other discriminatory treatment, or in any like or related manner restraining or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

a. Offer to Louis Evans immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights or privileges, and make him whole for any losses he may have suffered as the result of his discharge in the manner prescribed above in the Section entitled "The remedy."

b. Preserve and make available to the Board, or its agents, upon request, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to an analysis of the backpay due.

c. Post in conspicuous places at its usual place of business, including all places where notices to employees are customarily posted, copies of the notice attached hereto and marked Appendix A.[4] Copies of the said notice to be furnished by the Regional Director for the Thirty-first Region of the National Labor Relations Board, shall, after being signed by Respondent, be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in such conspicuous places. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

d. Notify the Regional Director of the Thirty-first Region, in writing, within 20 days from the receipt by Respondent of a copy of this Decision what steps Respondent has taken to comply therewith.[5]

II. Order of the National Labor Relations Board made August 24, 1966.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order

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[4]In the event these recommendations be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of the United States Court of Appeals, the word "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER," shall be substituted for the words "A DECISION AND ORDER."

[5]In the event that these recommendations are adopted by the Board, Paragraph 2(d) thereof shall be modified to read, "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps Respondent has taken to comply therewith.

of the Trial Examiner, as modified below, and hereby orders that the Respondent, Signal Oil and Gas Company, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified.

1. Add the following as Paragraph 2(b) to the Trial Examiner's Recommended Order and consecutively reletter the present paragraph 2(b) and those subsequent thereto:

"(b) Notify the above-named employee, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces."

2. Add the following to the Notice attached to the Trial Examiner's Decision:

> WE WILL notify the above-named employee, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

3. The address for Region 31, appearing at the bottom of the Notice attached to the Trial Examiner's Decision, is amended to read: 10th Floor, Bartlett Bldg., 215 West 7th Street, Los Angeles, Calif. 90014, Tel. No. 688-5850.